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 MEMORY, INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

ASETEK DANMARK A/S,
 Plaintiff and
 Counter-defendant,

v.

COOLIT SYSTEMS, INC.,
 Defendant and
 Counter-claimant,
 CORSAIR GAMING, INC. and CORSAIR
 MEMORY, INC.,
 Defendants.

Case No. 3:19-cv-00410-EMC

**DEFENDANTS' NOTICE OF MOTION AND
 MOTION TO STRIKE ASETEK'S LATE-
 DISCLOSED ALLEGED DESIGN-AROUNDS**

Date: May 5, 2022
 Time: 1:30 pm
 Location: Courtroom 5, 17th Floor
 Judge: Hon. Edward M. Chen

REDACTED/PUBLIC VERSION OF DOCUMENT FILED UNDER SEAL

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NOTICE OF MOTION AND MOTION TO STRIKE**TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORDS:**

PLEASE TAKE NOTICE that on May 5, 2022 at 1:30 p.m., or as soon thereafter as the matter may be heard, in this Court, located at San Francisco Courthouse, Courtroom 5 – 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102, Defendants CoolIT Systems, Inc., Corsair Gaming, Inc., and Corsair Memory, Inc. will and hereby do move to strike the Expert Report of Dr. Carl-Fredrik Stein Regarding Alternative Designs (“Stein Report”) and those portions of the Rebuttal Expert Report of Dr. David B. Tuckerman Regarding Non-Infringement of U.S. Patent Nos. 8,746,330; 9,603,284; and 10,274,266 and the Rebuttal Report of Nisha Marie Mody, Ph.D., that rely upon the Stein Report and the late-disclosed files in those reports. This motion is based upon this notice of motion and motion, the attached memorandum, the accompanying declaration of Reuben H. Chen and exhibits thereto, and upon such other and further matters, papers, and arguments as may be submitted to the Court at or before the hearing on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants CoolIT Systems, Inc. (“CoolIT”), Corsair Gaming, Inc., and Corsair Memory, Inc. (collectively “Corsair”) respectfully submit this motion to strike Plaintiff Asetek’s expert opinions based on the late-disclosed CAD¹ files and Ansys SpaceClaim² files—the type of design files required for meaningful technical analysis—of Asetek’s alleged design-arounds. In its rebuttal expert reports—served more than three months *after* the close of fact discovery—Asetek for the first time disclosed these critical design files, which Asetek’s expert then employed to render opinions.³ Asetek further produced samples of the alleged design-arounds only last month—over five months after close of fact discovery. Defendants are highly prejudiced by Asetek’s belated actions, and fairness requires that Asetek’s tardy injection of the design files for the purported alternate designs, and any expert opinions based on them, be stricken. In the alternative, CoolIT requests leave for further 30(b)(6) deposition testimony regarding the creation, design, and function of the late-disclosed design-arounds to evaluate, analyze, and provide expert testimony regarding the samples provided by Asetek; and to serve reply reports on infringement and damages to respond to Asetek’s belated expert opinions based on the late-disclosed design files.

II. FACTUAL BACKGROUND

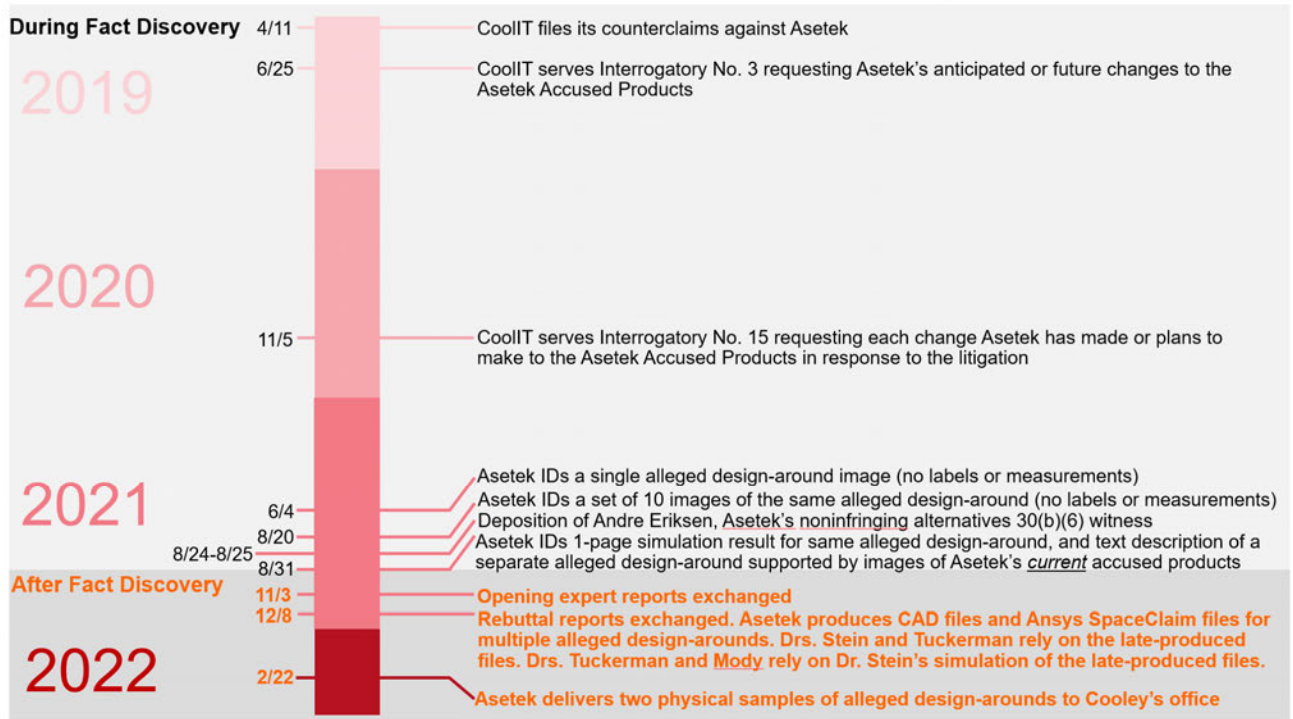
A. Timeline of Asetek’s untimely disclosure

A timeline summarizing the relevant dates of Asetek’s untimely disclosure of the alleged design-arounds is below, and will be further described in the following narrative.

¹ “CAD” stands for computer-aided design. (See, e.g., https://en.wikipedia.org/wiki/Computer-aided_design (last visited Mar. 29, 2022) (“Computer-aided design (CAD) is the use of computers (or workstations) to aid in the creation, modification, analysis, or optimization of a design.”).)

² “Ansys SpaceClaim” is a “3D Modeling Software” that “enables anyone to create, edit, or modify imported geometry[.]” (See <https://www.ansys.com/products/3d-design/ansys-spaceclaim> (last visited Mar. 29, 2022).)

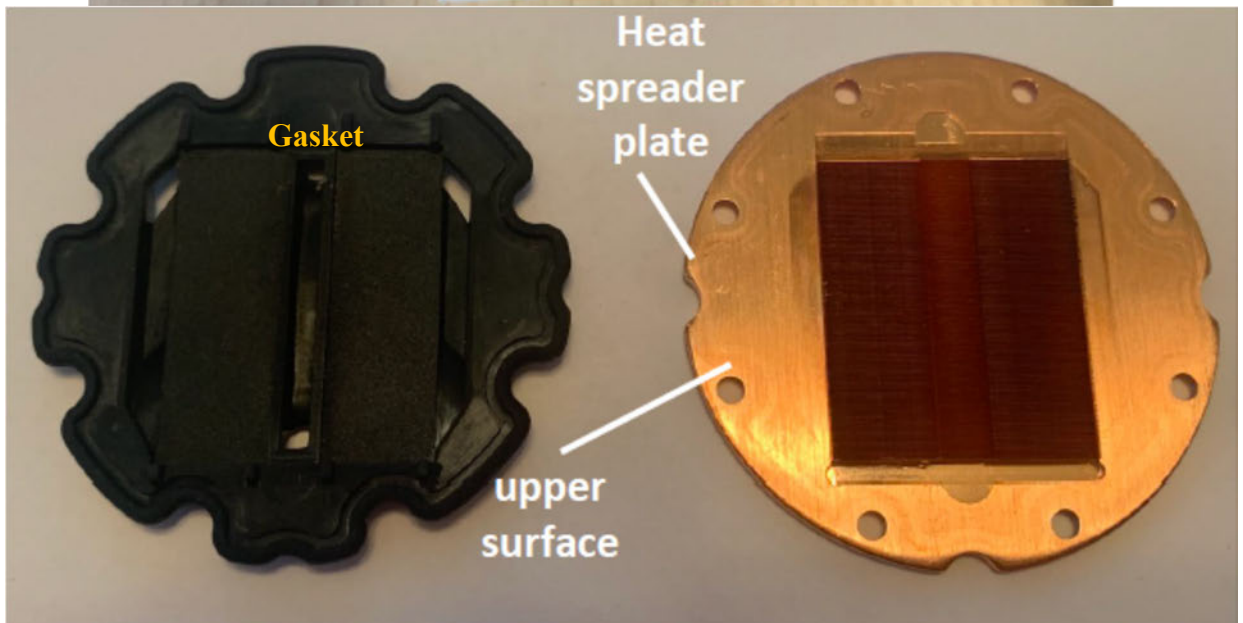
³ In addition to relying on improper, late-disclosed evidence, Asetek’s expert reports additionally fail to meet the standard for reliability required by *Daubert* and thus are also subject to separately filed *Daubert* motions.



B. Accused Asetek devices

CoolIT filed its counterclaims against Asetek on April 11, 2019. (ECF No. 23; *see also* ECF No. 37 (Amended Counterclaims, adding a patent, on May 2, 2019).) CoolIT presently asserts U.S. Patent Nos. 8,746,330 (the “330 patent”), 9,603,284 (the “284 patent”) and 10,274,266 (the “266 patent”) (collectively “CoolIT patents”) against Asetek’s products. The accused Asetek products are liquid cooling devices to cool computer processors, such as a CPU or GPU. (*See* Declaration of Reuben H. Chen (“Chen Decl.”), Ex.⁴ 1 at 30 (excerpt reproduced below).) Asetek’s accused cooling devices include a closed liquid loop that comprises a fluid heat exchanger to absorb heat from the processors and a pump external to the fluid heat exchanger to drive the liquid for circulation in the loop. (*See id.*)

⁴ All references to “Ex.” refer to exhibits to the Chen Declaration, unless otherwise noted.



The fluid heat exchanger includes components such as a heat spreader plate (or sometimes referred to as the “cold plate,” typically made of copper) with a bottom surface in contact with the processor to absorb heat, and an upper surface with “microchannels” formed by fins to dissipate the absorbed heat into the cooling liquid in circulation. (See Ex. 1 at 30 (excerpt reproduced above) (gold annotation added, white annotation in original).) Additionally, a plate (e.g., a rubber gasket) is

1 included to help seal the device and guide the liquid going through the fluid heat exchanger. Both the
 2 microchannel heat spreader plate (above right) and the gasket (*i.e.*, plate, above left) are accused of
 3 meeting limitations in the asserted claims of the CoolIT patents. (*See, e.g., id.* at 30 (element 1[a]: “a
 4 heat spreader plate defining an upper surface”) and 35 (element 1[c]: “a **plate** positioned over the
 5 distal ends of the plurality of fins”) (emphasis added).)

6 C. Fact discovery

7 Whether Asetek had any alleged design-arounds to CoolIT’s patents was a key issue for which
 8 CoolIT sought discovery. During fact discovery, CoolIT served two interrogatories—Nos. 3 and 15—
 9 that asked Asetek to identify any planned changes to the Asetek Accused Products. Interrogatory No.
 10 3 requested:

11 Fully explain any changes to the ASETEK ACCUSED PRODUCTS or
 12 any anticipated or future changes, including a description of each
 13 such change; the circumstances that led to the change; how the change
 14 was developed (including conception, design, testing, and
 15 manufacturing); when the change was or will be implemented; any
 internal name or reference, trade name, or product number associated
 with the change; and who was involved with the changes, including
 identification of persons most knowledgeable of and documents related
 to the changes.

16 (Ex. 2 (June 25, 2019 CoolIT’s First Set Interrogs. to Asetek) at 6 (emphasis added).) Interrogatory
 17 No. 15 requested:

18 Identify with specificity and fully explain each change that YOU have
 19 made or plan to make to the design, operation, and/or use of the
 20 ASETEK ACCUSED PRODUCTS as a result of or in response to
 21 this LITIGATION and/or the COOLIT PATENTS-IN-SUIT,
 22 including a description of each such change; when the change was or
 will be implemented; any internal name or reference, trade name, or
 product number associated with the change; and who was involved with
 the changes, including identification of persons most knowledgeable of
 and documents related to the changes.

23 (Ex. 3 (Nov. 5, 2020 CoolIT’s Third Set Interrog. to Asetek) at 2 (emphasis added).) Any information
 24 on the planned design-arounds to the CoolIT’s patents-in-suit, including without limitation the late-
 25 disclosed CAD and Ansys SpaceClaim design files required for analysis, was unequivocally
 26 encompassed by these interrogatories.⁵ *See, e.g.,* Fed. R. Civ. P. 33(d) (“If the answer to an
 27

28 ⁵ CoolIT also served Requests for Production and a 30(b)(6) deposition notice directed to Asetek’s

interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), ... the responding party may answer by ... specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could[.]").

Asetek's first substantive response to either interrogatory (in this case, Interrogatory No. 15) identified only one single-page document consisting of an apparently computer-generated image supposedly of an alleged design-around [REDACTED]. (Ex. 4 (June 4, 2021 Suppl. Resp. to Interrog. No. 15) at 2.) The image lacked any labels, measurements, or explanations. (See Ex. 7.) Two business days before the deposition of Asetek's 30(b)(6) witness on non-infringing alternatives, Andre Eriksen, Asetek supplemented its response to Interrogatory No. 15 and identified just one additional set of ten images apparently of the same design-around. (See Ex. 5 (Eriksen Depo. Tr.) at 188:25-189:6, 194:20-25, 195:14-21; Ex. 6 (Aug. 20, 2021 Second Suppl. Resp. to Interrog. No. 15) at 3.) Those images also failed to include any details, such as dimensions, measurements, functions, labels, or other explanations, let alone the specifics [REDACTED]. (Ex. 6 (Aug. 20, 2021 Second Suppl. Resp. to Interrog. No. 15) at 3; see also Ex. 8.) Asetek—through its corporate designee Mr. Eriksen—was unable to answer basic questions about the documents including who authored the documents, when they were created, who at Asetek created the alleged design around, and whether any simulations or testing had been performed on the design. (Ex. 5 (Eriksen Depo. Tr.) at 189:2-203:4; Exs. 7-8.)

After the deposition regarding Topic Nos. 20-21 on alternative designs, on the last day of fact discovery, Asetek again supplemented its interrogatory responses, citing to one more Bates-numbered page of an alleged simulation result of the supposed design-around, without any information about how or based on what the result was produced, other than providing the name of the person who performed the simulation and an explanation that it took [REDACTED] (Ex. 9 (Aug. 31, 2021 Third Suppl. Resp. to Interrog. No. 15) at 3; Ex. 10 (Aug. 31, 2021 Suppl. Resp. to Interrog. [REDACTED] design-arounds. (Ex. 18 (June 25, 2019 CoolIT's First Set of RFPs to Asetek, RFPs 71-72) at 15-16; Ex. 19 (July 9, 2021 CoolIT's 30(b)(6) Deposition Notice to Asetek, Topics 20-21) at 7.)

No. 3) at 14-16.) Additionally, Asetek's last-day supplemental response attempted to describe a separate design around for the very first time regarding [REDACTED]. (Ex. 10 (Aug. 31, 2021 Suppl. Resp. to Interrog. No. 3) at 14-16.) But Asetek did not even include a single drawing or sketch of this alleged design, instead pointing only to pictures [REDACTED], again without any technical details. (*Id.*) Additionally, no models, working prototypes, or physical samples of either alleged design-around ([REDACTED]) were ever produced during fact discovery.

These disclosures—eleven single-page images and one single-page summary of a supposed simulation result—were the only supporting evidence for Asetek's alleged design-arounds that were produced during fact discovery, so were the only supporting evidence available for analysis at the time CoolIT prepared and served its opening expert reports on November 3, 2021, including CoolIT's expert reports on infringement and damages. CoolIT's experts relied upon Asetek's disclosures as they existed at the close of fact discovery, including in their analysis of any alleged non-infringing alternatives. (*See* Ex. 11 at 17-20 (CoolIT's opening damages report discussing non-infringing alternatives with reliance on input from CoolIT expert Dr. Abraham).)

D. Asetek's rebuttal expert reports, CAD files, and Ansys SpaceClaim files

On December 8, 2021, the day rebuttal expert reports were due and more than three months after the close of fact discovery, Asetek produced for the first time detailed CAD files and Ansys SpaceClaim files corresponding to alleged design-arounds analyzed in Asetek's rebuttal expert reports, including the Expert Report of Dr. Carl-Fredrik Stein Regarding Alternative Designs (the "Stein Report"), apparently in rebuttal to CoolIT's analysis of the alleged non-infringing alternatives Asetek disclosed during fact discovery. (Chen Decl. ¶ 13; Ex. 12 (Stein Report).)

Tellingly, the Stein Report cited to none of the documents identified during fact discovery. Rather, the Stein Report explains that he was [REDACTED]

(Ex. 12 (Stein Report) ¶ 4.) Specifically, Dr. Stein explains that Asetek provided him with [REDACTED]

(Ex. 12 (Stein Report) ¶ 11.)

None of this information was ever provided during fact discovery, so none was available for analysis by any of CoolIT's experts.

Asetek served two other rebuttal expert reports that relied at least in part upon the Stein Report based on the late-produced design documents: (1) the Rebuttal Expert Report of Dr. David B. Tuckerman Regarding Non-Infringement of U.S. Patent Nos. 8,746,330; 9,603,284; and 10,274,266 ("Tuckerman Non-Infringement Report") and (2) the Rebuttal Report of Nisha Marie Mody, Ph.D. ("Mody Rebuttal Report"). (Ex. 13 (Tuckerman Non-Infringement Report) ¶ 82; Ex. 14 (Mody Rebuttal Report) ¶ 40.) The Tuckerman Non-Infringement Report also references and extensively relies upon the late-produced CAD files.⁶ (Ex. 13 (Tuckerman Non-Infringement Report) ¶¶ 76-81.) Dr. Mody provides no new technical analysis of any alleged non-infringing alternative, but instead quotes Asetek's supplemental response to Interrogatory No. 3 and then states: [REDACTED]

(Ex. 14 (Mody Rebuttal Report) ¶¶ 39-40.)

During deposition, Asetek's experts additionally admitted that they were not sure whether any prototypes of the alleged design-arounds existed at the time and, therefore, did not evaluate any prototypes. (Ex. 15 (Jan. 13, 2022 Stein Depo. Tr.) at 28:1-29:11; Ex. 16 (Dec. 22, 2021 Tuckerman Depo. Tr.) at 56:21-57:1.) The case schedule did not allow for reply reports, so no CoolIT experts were able to submit any reports analyzing or discussing any of the late-produced evidence of alleged design-arounds.

⁶ Dr. Tuckerman's report references one of the documents produced during discovery, but then opines on [REDACTED] (Ex. 13 ¶ 78.) This information was not provided with the documents produced during discovery, which included no measurements whatsoever.

E. Asetek's physical samples

On February 22, 2022 – more than five months after the close of fact discovery – Asetek delivered two physical samples of the alleged design-arounds to Cooley's office. (*See* Ex. 17.)

III. LEGAL STANDARD

Rule 26(e) requires a party to timely supplement or correct its interrogatory responses. Fed. R. Civ. P. 26(e)(1). “When a party fails to disclose information required by Rule 26, Rule 37(c)(1) provides that the improperly withheld information should be excluded, unless the failure to disclose is ‘substantially justified or harmless.’” *Ingenco Holdings v. Ace Am. Ins.*, 921 F.3d 803, 821 (9th Cir. 2019) (quoting Fed. R. Civ. P. 37(c)(1)) (affirming exclusion of evidence not included in an interrogatory responses or damages disclosure). “The Ninth Circuit affords district courts ‘particularly wide latitude’ in applying Rule 37(c)(1) to exclude information that a party failed to provide under Rule 26.” *See MLC Intell. Prop. v. Micron Tech.*, 10 F.4th 1358, 1370 (Fed. Cir. 2021); *see also Elliott v. Google*, 860 F.3d 1151, 1161 (9th Cir. 2017) (affirming exclusion of evidence not disclosed during discovery).

IV. ARGUMENT

The Stein Report relies entirely upon evidence of alleged design-arounds that were not properly disclosed in discovery. Asetek's failure to disclose its alleged design-arounds was neither substantially justified nor harmless, so the Court should exercise its wide latitude to exclude evidence of these alleged design arounds, including striking the entirety of the Stein Report and those portions of the Tuckerman Non-Infringement Report and Mody Rebuttal Report that rely upon the Stein Report based on the CAD and Ansys files that were never disclosed during fact discovery. Specifically, the Court should strike Tuckerman Non-Infringement Report paragraphs 76-78, the first portion of paragraph 79 (all sentences preceding “I agree with Mr. Eriksen ...”), and paragraphs 80-82. The Court should strike Mody Rebuttal Report paragraph 40.

A. Asetek failed to disclose its alleged design-arounds during discovery.

Had Asetek wanted to advance the design arounds set forth in the CAD files and Ansys SpaceClaim files the Stein Report is based on, it should have produced them during fact discovery. CoolIT served not one but two interrogatories on Asetek seeking Asetek's future plans and designs

1 for the Asetek Accused Products, in addition to Requests for Production and 30(b)(6) deposition topics
 2 directed to alleged non-infringing alternatives and alternate designs. Asetek apparently understood its
 3 obligation to disclose its design-arounds, as it scrambled to inject bare-bones alternate designs towards
 4 the end of fact discovery. But Asetek did not disclose the specific alleged design-arounds reflected in
 5 the CAD files and related Ansys SpaceClaim files critical for analysis, such as the kind of simulations
 6 described in the Stein Report. Generating CAD files, then Ansys SpaceClaim files based on CAD
 7 files, and finally simulations using the Ansys SpaceClaim files each takes time: Asetek plainly knew
 8 before December 8, 2021 that it had additional alleged design-arounds but elected not to disclose
 9 anything about their development or existence before serving rebuttal reports.

10 Indeed, all of the alleged design-arounds analyzed in the Stein Report are based on CAD files
 11 that were never produced to CoolIT until December 8, 2021 – after CoolIT had already submitted the
 12 report of Dr. Himanshu Pokharna on Asetek’s infringement of CoolIT’s patents and the report of Dr.
 13 John Hansen on CoolIT’s damages. This was more than three months after Asetek’s final
 14 supplemental interrogatory responses were served (on August 31, 2021, the close of fact discovery).
 15 And it was more than a month after CoolIT served opening expert reports (including CoolIT’s expert
 16 reports on infringement and damages) on November 3, 2021 that relied on Asetek’s discovery as of
 17 that date to opine that “Asetek has not presented any evidence that it would be able to offer a
 18 commercially acceptable desktop product for sale without utilizing the CoolIT Patents-In-Suit.” (*See*
 19 Ex. 11 ¶ 51.)

20 The Stein Report includes illustrations of the changed products supposedly embodied by the
 21 CAD files, but as shown below, these illustrations do not show how, or even if, they match the
 22 drawings in the documents cited in Asetek’s interrogatory responses. (*Compare* Ex. 12 (Stein Report)
 23 at 5-6 *with* Ex. 8 (Depo. Ex. 186) at ASE-CLT00054033-42.) In fact, if anything, [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]. (*Compare* Ex.
 27 12 (Stein Report) at 5-6 *with* Ex. 8 (Depo. Ex. 186).)

28 Because Asetek was obligated to disclose its alleged design arounds during discovery and

1 failed to do so, Asetek may not rely upon its late-disclosed design-around evidence unless Asetek's
 2 failure to properly disclose its evidence was either "substantially justified or harmless." But Asetek
 3 has no justification for failing to disclose its design arounds, and CoolIT has been prejudiced by
 4 Asetek's omission, so Asetek cannot rely upon its late-disclosed theories and evidence.

5 **B. Asetek cannot substantially justify its failure to timely disclose evidence of its**
 6 **design-arounds.**

7 CoolIT served its two interrogatories seeking Asetek's design plans for the Asetek Accused
 8 Products on June 25, 2019 (Interrogatory No. 3) and November 5, 2020 (Interrogatory No. 15). This
 9 meant Asetek had over two years—from June 2019 to August 2021—to formulate its theories and
 10 develop evidence of alleged design-arounds, and then to timely disclose them to CoolIT before the
 11 August 31, 2021 close of fact discovery. But over the course of more than 2 years, Asetek disclosed
 12 only twelve Bates-numbered pages showing limited information (with no measurements and no design
 13 specifications) for only one of its supposed design-around theories. Those documents consisted of
 14 eleven single-page drawings with no dimensions, measurements, functions, labels, or other
 15 explanations and one page produced on the last day of discovery allegedly summarizing simulation
 16 results for the design depicted in the drawings. **None of those pages were actually relied on by Dr.**
 17 **Stein.**

18 Rather than stand on the alleged design arounds and evidence Asetek disclosed over the course
 19 of two years of fact discovery, Asetek in the three months *after* close of fact discovery developed a
 20 new set of plans for multiple alleged design-arounds, this time supported by the detailed CAD files
 21 and Ansys SpaceClaim files required for any analysis. Asetek could and should have developed and
 22 produced those CAD and Ansys SpaceClaim design files before the August 31, 2021 close of fact
 23 discovery, or at least well before the November 3, 2021 service of CoolIT's opening expert report on
 24 infringement. It was entirely within Asetek's control to develop these theories and evidence, but they
 25 did not do so on time. *Cf. MLC Intell. Prop.*, 10 F.4th at 1371 (affirming exclusion of late-disclosed
 26 reliance on evidence that was in plaintiff's possession "from the outset of the case").

27 Further, Asetek produced no actual samples of the alleged design-arounds until last month.
 28 Their late disclosure of CAD files, Ansys SpaceClaim files, and physical samples was untimely and

1 improper.

2 **C. Asetek's untimely disclosure has harmed CoolIT and Corsair.**

3 CoolIT and Corsair have been prejudiced by Asetek's untimely disclosure of its new design-
4 around theories and evidence, so the late disclosure is not harmless and should be struck.

5 Asetek did not disclose the CAD files and Ansys SpaceClaim design files required for analysis,
6 such as the simulation performed by Dr. Stein, until December 8, 2021, the same day it served the
7 Stein Report. This was over a month after CoolIT served its opening expert report on infringement
8 (served November 3, 2021), and the case schedule does not allow for reply reports. As such, this was
9 clearly an ambush to which Asetek knew CoolIT would have no ability to respond. CoolIT's
10 infringement expert, Dr. Himanshu Pokharna, did not have an opportunity to opine upon whether any
11 of the alleged design arounds described in the Stein Report are, in fact, still infringing (e.g., under the
12 doctrine of equivalents) because at the time Asetek had not produced any detailed evidence describing
13 the alleged design-arounds, for example the CAD and Ansys SpaceClaim design files. Such technical
14 specifications and detailed evidence would have been necessary for Dr. Pokharna to perform any
15 meaningful analysis, such as the kind of simulations performed by Dr. Stein, that would have been
16 critical for, e.g., an infringement theory under the doctrine of equivalents.⁷ Likewise, CoolIT's
17 damages expert was unable to opine on these late-disclosed alleged design-arounds. CoolIT also was
18 unable to perform any actual testing of the design-around because no actual samples were produced
19 until last month. CoolIT further was unable to obtain any fact discovery regarding these alleged design
20 arounds—such as regarding their design process, functionality, or cost and time to implement—
21 because they were not disclosed until more than three months after the close of fact discovery. In fact,
22 to date, Asetek still has not supplemented its responses to Interrogatories No. 3 and 15 to describe
23 these new design-arounds, nor offered Mr. Eriksen for additional 30(b)(6) deposition testimony
24 regarding the alleged design-arounds.

25 CoolIT's inability to seek fact discovery or provide expert testimony regarding the late-

26
27 ⁷ Indeed (and in sharp contrast), in Asetek's infringement case against CoolIT, CoolIT produced the
28 detailed design files, including without limitation CAD files, for CoolIT's new design prior to close
of fact discovery. (Chen Decl. ¶ 22.)

disclosed design-arounds is prejudicial and harmful to CoolIT. *See, e.g., MLC Intell. Prop.*, 10 F.4th at 1370-71 (“[W]e agree with the district court that, had MLC disclosed this information, Micron could have sought fact discovery regarding this contention.”). As a result, Asetek’s late-disclosed design-arounds, including Bates Numbers ASE-CLT00054279-94 and ASE-CLT00054299-306, should be excluded from this case.

D. All expert testimony relying on the excluded evidence should be struck.

Because Asetek cannot rely upon its late-disclosed evidence, the Stein Report should be struck in its entirety. The simulations and opinions described in the Stein Report are entirely based on the CAD files and related Ansys SpaceClaim design files for Asetek’s new design-around plans produced long after close of fact discovery. Asetek should not be allowed to rely upon such late-disclosed evidence. The Stein Report does not simulate or rely upon any other design-around theories or evidence disclosed prior to close of fact discovery, and in particular does not rely upon any of the theories or evidence actually disclosed in Asetek’s responses to Interrogatories No. 3 and 15. As a result, the entirety of the Stein Report should be struck.

Furthermore, two other Asetek rebuttal reports—the Tuckerman Non-Infringement Report and the Mody Rebuttal Report—each expressly invoke and rely upon the Stein Report (and, in the case of the Tuckerman Non-Infringement Report, the late-produced CAD files) for certain of their conclusions and analyses. (Ex. 13 (Tuckerman Non-Infringement Report) ¶¶ 76-82; Ex. 14 (Mody Rebuttal Report) ¶ 40.) To the extent these reports rely upon the Stein Report and the late-produced CAD files and Ansys SpaceClaim design files, those portions of the Tuckerman Non-Infringement Report and Mody Rebuttal Report should also be struck. This includes at a minimum Paragraphs 76-78, first portion of 79, and 80-82 of the Tuckerman Non-Infringement Report and the first sentence of Paragraph 40 of the Mody Rebuttal Report.

Under Rule 37, the appropriate sanction for Asetek’s failure to timely disclose its theories and evidence during fact discovery is to exclude all such evidence, as courts in this district and throughout the Ninth Circuit have routinely found. *See, e.g., MLC Intell. Prop. v. Micron Tech.*, No. 14-cv-03657-SI, 2019 WL 2863585, at *14-15 (N.D. Cal. July 2, 2019) (striking under Rule 37 expert opinions for which factual basis was not timely disclosed during fact discovery), *aff’d*, 10 F.4th at 1373; *Ingenco*

1 *Holdings*, 921 F.3d at 821 (affirming Rule 37 exclusion of evidence not timely disclosed); *Elliott*, 860
 2 F.3d at 1161 (same); *In re Koninklijke Philips Pat. Litig.*, No. 18-cv-01885-HSG, 2020 WL 7398647,
 3 at *5 (N.D. Cal. Apr. 13, 2020) (excluding noninfringing alternatives disclosed in rebuttal expert report
 4 but not interrogatory responses); *Asia Vital Components v. Asetek Danmark A/S*, 377 F. Supp. 3d 990,
 5 1003-05 (N.D. Cal. 2019) (excluding theories disclosed in rebuttal expert report but not interrogatory
 6 responses); *Apple v. Samsung Elecs.*, No. 11-CV-01846-LHK, 2012 WL 3155574, at *5 (N.D. Cal.
 7 Aug. 2, 2012) (same); *see also Innogenetics, N.V. v. Abbott Lab 'ys*, 512 F.3d 1363, 1375-76 (Fed. Cir.
 8 2008) (excluding arguments disclosed for the first time on last day of discovery); *cf. Elbit Sys. Land*
 9 *& C4I v. Hughes Network Sys.*, No. 2:15-CV-00037-RWS-RSP, 2017 WL 2651618, at *12 (E.D. Tex.
 10 June 20, 2017 (prejudice of disclosure of alleged alternative design in expert reports “is significant”
 11 because the plaintiff “has not had a chance to test the underlying merits of these conclusions through
 12 discovery”).

13 Asetek’s attempt to bypass the normal process of fact and expert discovery on its noninfringing
 14 alternatives theories is wholly improper and unfairly prejudicial to CoolIT, who is left with no
 15 opportunity to understand let alone fully analyze Asetek’s new theories and evidence. If the Court
 16 nevertheless is not inclined to strike the Stein Report and the portions of the Tuckerman and Mody
 17 Reports that rely upon the late-disclosed evidence and/or the Stein Report, however, the Court should
 18 grant CoolIT leave to take discovery including further deposition testimony from Mr. Eriksen on the
 19 purported design-arounds, and/or to at least submit reply reports that respond to Asetek’s late-
 20 disclosed theories and evidence. The reply reports alone would not fully address the prejudice CoolIT
 21 incurred from its inability to seek further fact discovery about the late-disclosed design-around
 22 theories, if not granted. But leave to file reply reports on infringement and damages would help
 23 alleviate the prejudice to CoolIT at least by allowing its experts to address whether or not Asetek’s
 24 alleged new design arounds are in fact non-infringing, as Asetek claims, and any resulting impact to
 25 CoolIT’s damages. Because Asetek’s egregious and improper litigation tactics precipitated any such
 26 further discovery, Asetek should additionally bear the incremental costs for CoolIT’s further fact and
 27 expert discovery, if the Court is not inclined to strike the improper, late-disclosed evidence.
 28

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court grant their Motion
 3 to Strike Asetek's reliance upon late-produced evidence, including the entire Stein Report, Paragraphs
 4 76-78, first portion of 79, and 80-82 of the Tuckerman Non-Infringement Report and the first sentence
 5 of Paragraph 40 of the Mody Rebuttal Report.

6 Dated: March 31, 2022

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